

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
December 5, 2000 Session

**STATE OF TENNESSEE v. LEE O. ANDERSON**

**Direct Appeal from the Circuit Court for Fayette County  
No. 4786-A     Jon Kerry Blackwood, Judge**

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**No. W2000-00671-CCA-R3-CD - Filed February 9, 2001**

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The defendant was found guilty by a Fayette County jury of simple possession of a controlled substance, a Class A misdemeanor; delivery of a controlled substance in an amount of .5 grams, to wit cocaine, a Class B felony; and delivery of a controlled substance in an amount less than .5 grams, to wit cocaine, a Class C felony. Tenn Code Ann. § 39-17-417(a) & (c). The defendant was sentenced to concurrent sentences of eleven months and twenty-nine days, thirty years, and fifteen years, respectively, with fines totaling \$4250. The defendant now brings this appeal claiming that: 1) the trial court erred by denying his motion in limine that sought to preclude the State from introducing evidence regarding proof of the defendant's sale of a controlled substance as applied to this case, 2) that the trial court erred because it denied the defendant's requests to charge the jury with special instructions regarding the delivery of a controlled substance and simple possession or casual exchange, and 3) the trial court erred by not granting the defendant's motion for a mistrial because the State indicated during opening statements that it would prove that the defendant had sold cocaine, and made repeated references during trial to the offense of sale of cocaine. After a review of the record, we conclude that the issues raised by the defendant in this appeal are without merit. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOE G. RILEY and ROBERT W. WEDEMEYER, JJ., joined.

C. Michael Robbins, Memphis, Tennessee, for the appellant, Lee O. Anderson.

Paul G. Summers, Attorney General and Reporter; Lucian D. Geise, Assistant Attorney General; Elizabeth T. Rice, District Attorney General; and Colin A. Campbell, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

In July 1999, the defendant, Lee O. Anderson, was indicted by a Fayette County Grand Jury on two counts of delivery of a controlled substance less than .5 grams, to wit cocaine, and one count of delivery of a controlled substance in an amount equal to .5 grams, to wit cocaine. On December 1, 1999, the defendant was found guilty by a Fayette County jury of simple possession of a controlled substance, a Class A misdemeanor; delivery of a controlled substance in an amount of .5 grams, to wit cocaine, a Class B felony; and delivery of a controlled substance in an amount less than .5 grams, to wit cocaine, a Class C felony. Tenn Code Ann. § 39-17-417(a) & (c). The defendant was ultimately sentenced to concurrent sentences of eleven months and twenty-nine days, thirty years, and fifteen years, respectively, with fines totaling \$4250. On January 4, 2000, the defendant filed a motion for a new trial. The motion was denied on March 20, 2000. On March 23, 2000, the defendant filed a notice of appeal, and this appeal followed.

## **FACTS**

On November 21, 1998, the defendant was approached by an undercover police officer who was working as part of a drug sting operation that was being conducted by law enforcement officials. During the first of three sales the defendant made to the undercover police officer, the defendant sold \$35 worth of crack cocaine to the undercover officer, which was later tested and found to weigh .1 grams.

On November 25, 1998, the same undercover officer made contact with the defendant a second time and asked the defendant to sell him \$60 worth of crack cocaine. The defendant told the undercover officer to drive his car to the same area where the defendant had sold crack cocaine to the officer four days earlier. After a brief wait, the defendant met the officer and sold the officer \$60 worth of crack cocaine. To play the role of a thankful drug user who appreciated the defendant getting the crack cocaine for him, the undercover officer gave the defendant some of the drugs. When the crack cocaine was later tested, it weighed .3 grams.

Finally, on November 28, 1998, the same undercover officer was flagged down by the defendant. On this third occasion, the defendant and the undercover officer returned to the area where the previous two drug transactions occurred. When the two arrived, the undercover officer told the defendant that he wanted to buy \$100 worth of crack cocaine. The defendant then got out of the undercover officer's car, left for a short time, and then returned. When the defendant returned with the crack cocaine, the defendant found someone else in the car with the undercover officer. The defendant proceeded to run the other person off, telling that person that the undercover officer was "his customer." The transaction then occurred, ending with the undercover officer again giving the defendant some of the crack cocaine. When the crack cocaine was later tested, it weighed .5 grams.

On July 26, 1999, the defendant was indicted by a Fayette County Grand Jury for two counts of delivery of a controlled substance in an amount less than .5 grams, to wit cocaine, and one count of delivery of a controlled substance in an amount equal to .5 grams, to wit cocaine. The defendant

was subsequently arrested, and on December 1, 1999, the defendant was found guilty by a Fayette County jury of simple possession of a controlled substance, a Class A misdemeanor; delivery of a controlled substance in an amount of .5 grams, to wit cocaine, a Class B felony; and delivery of a controlled substance in an amount less than .5 grams, to wit cocaine, a Class C felony. Tenn Code Ann. § 39-17-417(a) & (c). The defendant was ultimately sentenced to concurrent sentences of eleven months and twenty-nine days, thirty years, and fifteen years, respectively, with fines totaling \$4250. On January 4, 2000, the defendant filed a motion for a new trial. The motion was denied on March 20, 2000. On March 23, 2000, the defendant filed a notice of appeal, and this appeal followed.

## **ANALYSIS**

### **1. Motion in Limine**

The defendant first contends that the trial court erred by denying his motion in limine that sought to preclude the State from introducing evidence regarding the defendant's sale of controlled substances as applied to this case. We do not agree.

#### **A. Standard of Review**

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. Rule. Evid. 401. Further, the trial court has discretion in determining whether evidence meets the test for relevancy set out in Rule 401 of the Tennessee Rules of Evidence. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995). It is also within the trial court's discretion to determine the probative value and danger of unfair prejudice regarding the evidence. State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993). Absent a clear showing that the trial court abused its discretion, this Court will not overturn a trial court's determination on relevancy. State v. Williamson, 919 S.W.2d 69, 78-79 (Tenn. Crim. App. 1995).

#### **B. Analysis**

The defendant filed a motion in limine seeking to exclude, first, "any evidence of the prior felony convictions of the defendant for purposes of impeachment ... or for any other purpose at the guilt/innocence stage of the trial," and, second, "an order ... directing that the State not introduce any evidence, direct or circumstantial, documentary, testimonial, or real, as to an agreed offer and acceptance for good consideration concerning the three counts of the indictment alleging unlawful and knowing delivery of cocaine."

After a hearing on the motion, the trial court granted the defendant's motion in limine regarding the defendant's prior convictions, finding that "the prejudicial effects outweigh[ed] the probative value." While the defendant argued vehemently that the "sale" aspects of the uncharged crime were irrelevant, and that the trial court was harming the defendant's defense strategy by

allowing such evidence, the trial court ultimately denied the second part of the defendant's motion in limine and allowed the State to introduce evidence of the "sale" aspects of the crimes charged. The trial court found that the aspects of the sale were "relevant to the entire crime." The trial court stated, however, that if the facts of the case did not show the "sale aspects" of the charged crimes to be relevant, it would reconsider its decision.

In the defendant's brief, the defendant again raises the issue of relevancy, pointing out Tennessee Rule of Evidence 401. The defendant quotes Rule 401, that "evidence is relevant ... when it makes a fact of consequence more or less probable than would be the case without the evidence." The defendant further argues that the trial court did not make its ruling on the "sale aspect" portion of the motion in limine based upon relevancy. The motion in limine hearing transcript reflects otherwise, however. As we have already pointed out, the trial court did make its ruling based upon relevancy. When the trial court made its finding of relevancy, it found that both the sale aspect and delivery aspect were intimately related.

Our review of the record supports the trial court's findings. The sales aspects of the crimes charged did in fact make the crimes charged more probable than they would have been had the case been tried without such evidence. Further, our review of the record has failed to yield any evidence that the admission of the sales aspects of the crimes charged was unfairly prejudicial. We do not find any abuse of the trial court with regards to this issue. This issue is without merit.

## 2. Special Jury Instructions

The defendant next contends that the trial court erred because it denied the defendant's requests to charge the jury with special instructions regarding the delivery of a controlled substance, and simple possession or casual exchange. We do not agree.

### Analysis

\_\_\_\_\_ We begin our analysis by noting that when a trial court correctly charges the applicable law, it is not error for it to deny all or any part of a special request as long as the charge is given fully and fairly. Edwards v. State, 540 S.W.2d 641, 649 (1976); Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). The defendant specifically contends that the trial court erred when it failed to charge the jury as requested, and further contends that this failure resulted in a jury that was not able "to intelligently assess whether this was a casual exchange or an unlawful delivery."

The defendant first requested special jury instructions regarding the delivery of a controlled substance. The trial court gave a full and fair instruction to the jury on the delivery of a controlled substance. However, the court did not charge the jury by using the language requested by the defendant, that "the State must have proven beyond a reasonable doubt that the defendant had a pre-existing design or plan to accomplish the delivery." Our review of the record indicates that the trial court did charge the jury with the requirement that the State prove the defendant's guilt beyond a reasonable doubt. Further, the trial court explained the meaning of reasonable doubt. The charge

of reasonable doubt was given prior to the trial court setting forth jury instructions on the specific crimes alleged, and in the body of the jury instructions of the specific crimes alleged. Further, the trial court gave a full and fair explanation of the meaning of beyond a reasonable doubt prior to giving instructions to the jury on the crimes the defendant was alleged to have committed.

Having found no problems regarding the first portion of the language specifically requested by the defendant, we turn our attention to the second part of the language the defendant specifically requested that the trial court charge the jury with. The defendant specially requested that the trial court charge the jury with language that delivery could only be found if the State proved “that the defendant had a pre-existing design or plan to accomplish the delivery.” The trial court was correct in denying this charge to the jury. The Tennessee Legislature has defined delivery as “the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.” Tenn. Code Ann. § 39-17-402(6). Nowhere in this language does the legislature set forth that delivery can only be found if the State proves “that the defendant had a pre-existing design or plan to accomplish the delivery.” Such an instruction would have been incorrect.

The defendant also requested special jury instructions regarding simple possession or casual exchange. As with the trial court’s instruction on delivery, the trial court gave a full and fair instruction to the jury on simple possession or casual exchange. The defendant contends, however, that the trial court erred because it did not instruct the jury in its charge that a “casual exchange is a spontaneous passing of a small amount of drugs.” The trial court, however, instructed the jury that an “‘exchange’ means to part with, give, or transfer a substance in consideration of something received as an equivalent. ‘Casual’ means without design. The term ‘casual exchange’ does not exclude a transaction in which money is involved.”

The definition of casual exchange is not set forth in Tennessee Code Annotated section 39-17-402. Therefore we turn elsewhere for guidance in determining the meaning of this phrase.. The Tennessee Supreme Court has specifically said that “[c]asual means without design.” State v. Helton, 507 S.W.2d 117, 120 (1974). In State v. Brown, this Court set forth that “a casual exchange is one that occurs without design ... and *contemplates* a spontaneous passing of a small amount of drugs.” State v. Brown, CCA No. 01C01-9711-CC-00518, \*5 (Tenn. Crim. App. filed September 24, 1999, at Nashville). (emphasis added). The definition of a casual exchange is clear. A casual exchange is an exchange that is without design.

The defendant’s request for a jury instruction directing that a casual exchange “is a spontaneous passing of a small amount of drugs” clearly shows that he is somewhat confused regarding the definition of what a casual exchange is, and under what circumstances a casual exchange is usually found. Indeed, a casual exchange may be inferred when a small amount of drugs is passed, see Loveday v. State, 546 S.W.2d 822 (Tenn. Crim. App. 1976), and indeed “a common example of a casual exchange is the spontaneous passing of a small amount of drugs at a party.” State v. Copeland, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998). While these examples illustrate when a casual exchange may be found, they are not the definition set forth for a casual exchange.

Our review of this issue has failed to show that the trial court erred by not using the exact language requested by the defendant when the trial court charged the jury with the law concerning delivery and simple possession or casual exchange. The court did correctly charge the jury with the applicable law, and the charge was fully and fairly given. This issue is without merit.

### 3. Mistrial

The defendant next contends that the trial court erred by not granting the defendant's motion for a mistrial because the State indicated during opening statements that it would prove that the defendant had sold cocaine, and made repeated references during trial to the offense of sale of cocaine. We do not agree.

#### A. Standard of Review

The determination of whether to grant a mistrial rests within the sound discretion of the trial court. State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994). The reviewing court should not overturn that decision absent an abuse of discretion. State v. Hall, 947 S.W.2d 181, 184 (Tenn. Crim. App. 1997). The burden of establishing the necessity for mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). No abstract formula should be mechanically applied in making this determination, and all circumstances should be taken into account. State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993).

#### B. Analysis

The defendant contends that the trial court erred by not granting the defendant's motion for a mistrial because the State indicated during opening statements that it would prove that the defendant had sold cocaine, and made references during trial to the offense of sale of cocaine. Our review of the record reflects that the trial court gave a curative instruction to the jury, setting forth that statements made by counsel were not evidence; that proof would be shown through the evidence presented during the trial; and that the jury was to disregard statements as to the defendant's guilt on the crime of sale of cocaine. As this Court and the Tennessee Supreme Court have held in the past, a jury is presumed to have followed instructions given by the court. State v. Nesbit, 978 S.W.2d 872, 885 (Tenn. 1998); State v. Alvarado, 961 S.W.2d 136, 147 (Tenn. Crim. App. 1996).

The defendant has failed to show that the jury failed to follow the curative instruction given by the trial court. Further, the defendant has failed to carry the burden of establishing the necessity for a mistrial. The trial court was correct in issuing a curative instruction regarding the State's comments on the defendant's guilt as to the sale of cocaine, and was correct in denying the defendant's motion for a mistrial. This issue is without merit.

### CONCLUSION

After a thorough review of the record, we conclude that the issues set forth in this appeal are without merit. The judgment of the trial court is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE